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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 91

IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 107

FRANK W. MCCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE REGIONAL DIRECTOR AND MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the district court and of the court of appeals in Nos. 91 and 93 (IR. 46–52, 59–82)[1] are

[1] The record in Nos. 91 and 93 will be designated "IR.", and the record in No. 107, "IIR."

reported at 200 F. Supp. 484 and 300 F. 2d 222, respectively. The opinion of the district court in No. 107 (II R. 51–67) is reported at 201 F. Supp. 82. The Board's Decision and Direction of Election (IR. 9–19; II R. 31–41), which is the subject of these suits, is reported at 134 NLRB No. 25.

JURISDICTION

The judgment of the court of appeals in Nos. 91 and 93 was entered on January 12, 1962 (IR. 83). The petitions for writs of certiorari were filed on April 10 and 11, 1962, respectively, and were granted on June 11, 1962 (IR. 88; 370 U.S. 915). In No. 107, the final judgment of the district court was entered on March 6, 1962 (IIR. 76–77), and an appeal therefrom was docketed in the court of appeals on April 9, 1962 (IIR. 81). The petition for a writ of certiorari was filed on May 7, 1962, and was granted on June 11, 1962 (IIR. 82; 370 U.S. 915). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, *et seq.*), and of the other relevant statutes and treaties, are set forth in Appendix A, *infra*, pp. 61–67.

QUESTION PRESENTED

Whether the National Labor Relations Act extends to seagoing vessels which: (1) are beneficially owned by, and operated under the control of, an American corporation; (2) are engaged in regular sailings in foreign commerce between the United States and

Latin American ports, transporting almost exclusively the corporation's products and other supplies; but (3) fly the flag of a foreign nation, carry a foreign crew, and have certain other contacts with the foreign nation.[2]

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING GIVING RISE TO THESE SUITS

1. THE BOARD'S FINDINGS OF FACT

On November 13, 1959, the National Maritime Union of America, AFL–CIO ("NMU") filed a petition with the National Labor Relations Board pursuant to Section 9(c) of the National Labor Relations Act seeking certification as the representative of a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag vessels owned by Empresa Hondurena de Vapores, S.A., a Honduran corporation.[3] The petition was filed against United Fruit Company ("UFCO"), an American corporation, of which Empresa is a wholly owned and controlled subsidiary. Sociedad Nacional de Marineros de Honduras ("Sociedad"), a Honduran union which currently represented the employees aboard the ves-

[2] The issue of the Act's applicability to foreign flag vessels having substantial contacts with the United States is also presented in *Incres Steamship, Ltd.*, v. *International Maritime Workers Union, No. 33*, this Term. For the reasons set forth *infra*, p. 35, n. 38, the Board is of the view that the judgment of the Court of Appeals of New York in that case should be affirmed.

[3] The facts set forth herein are derived primarily from the Board's Decision and Direction of Election, which was attached as an exhibit to the complaints in the district court (IR. 9–19; IIR. 31–41).

sels, was invited to intervene in the proceedings but declined to do so or otherwise to participate. However, Sindicato Maritimo Nacional de Honduras ("Sindicato"), another Honduran union, did intervene and participate, as did Empresa. UFCO, together with Empresa, contested the Board's jurisdiction on the ground that the Act does not apply to ships flying the flag of a foreign nation (IR. 9–10, 17; IIR. 31–32, 39). The underlying facts of the maritime operations involved, as found by the Board, are as follows:

UFCO is a New Jersey corporation with its principal place of business in Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by United States citizens. UFCO is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. Most of its trade is between Central and South American locations and United States ports. The value of its imports into the United States exceeds one million dollars annually. The imports are carried on ships either owned or chartered by UFCO (IR. 12; IIR. 34).

UFCO conducts its operations through fifty to sixty subsidiaries, many of which are foreign corporations. Day-to-day operations are handled by the subsidiaries themselves, while overall control of policy and development resides with UFCO. Thus, long range plans concerning expansion, contraction, or other changes in the operation of subsidiaries are generally controlled by UFCO, and its decision on such matters

is based upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce, rather than upon the needs or advancement of the subsidiaries as independent corporations (IR. 12–14; IIR. 35).

Empresa is one of UFCO's wholly-owned subsidiaries. If was organized under Honduran law in 1941 by UFCO, which supplied the capital. Empresa's officers are elected by its directors who are in turn elected by UFCO, the sole stockholder. Empresa is engaged in the business of owning and operating vessels registered under Honduran law. Empresa does not carry passengers or cargo on its own account, but has, since its incorporation, time chartered[4] all of its vessels, and its income from maritime operations (exceeding $400,000 annually) is derived wholly from the charter fees. With a few possible exceptions, Empresa's business is limited to chartering its vessels to UFCO, and the 17 ships which were the subject of the NMU representation petition were so chartered (IR. 13–14; IIR. 35–36).[5]

Under the time charters, Empresa provides ships that are fully equipped and ready to be put to sea.

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[4] Under a "time" charter, the charterer provides not only the vessel, but also the officers and crew. This is to be distinguished from a "bareboat" charter, which covers only the vessel.

[5] Empresa owned 14 of the vessels, while 3 were owned by Balboa Shipping Corporation, a Panamanian corporation wholly-owned by UFCO. Empresa was the managing agent for those vessels which, like its own ships, fly the flag of Honduras. The three Balboa vessels were, for all practical purposes, as fully under Empresa's control as were its own vessels. (IR. 14; IIR. 36.)

It is responsible for the physical condition of the ships and for provisioning them, except for fuel. Thus, Empresa takes care of day-to-day upkeep and drydocking and repairs, both of the latter usually being done in the United States.* Supplies are purchased both in foreign nations and the United States, purchases in the United States being made from Maratrop Trading Corporation, a wholly-owned UFCO subsidiary (IR. 14; IIR. 36). Empresa is also responsible for hiring the officers and crews, and handling all matters concerning terms and conditions of employment including payment of wages and discipline of personnel. The crews, hired in Honduras, are primarily Honduran citizens and they sign Honduran shipping articles (IR. 14, 4; IIR. 36–37, 2). Empresa had recognized, and entered into a contract with a Honduran union, Sociedad, as the representative of its seamen (IR. 17, 22–35; IIR. 40, 9–23).

As the charterer of the vessels, UFCO determines what voyages they will make, their ports of call, their length of stay in various ports, and what cargoes they will carry. In exercising its control, UFCO deals directly with the particular vessel's captain. However, if UFCO has complaints concerning the handling of the vessel or its mechanical or other condition, it takes them up directly with Empresa (IR. 14–15; IIR. 37).

The ships are used primarily to carry produce of UFCO's Latin American operations, and on any given

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*However, improvements for vessels or the purchase and scrapping of vessels are matters within the overall policy control of UFCO (IR. 14; IIR. 36).

trip might call at ports in various Central and South American countries including Honduras. Since the bulk of the trade is between such countries and the United States, the vessels regularly call at United States ports. On return trips to Latin America, the ships carry cargo for various UFCO subsidiaries, as well as general cargo for shippers and consignees outside the UFCO organization. Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO owns outright a number of cargo ships registered under United States law, and also charters boats from one of its United States subsidiaries. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargoes and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination depends on the vessel's availability, size and speed, not on its ownership or flag (IR. 15; IIR. 37).

2. THE BOARD'S CONCLUSIONS AND DIRECTION OF ELECTION

On these facts, the Board concluded that Empresa's maritime operations were part of a single, integrated maritime operation under the continuous direct control, and either direct or ultimate ownership, of UFCO, and hence were an essential part of a seagoing enterprise located in and directed from the United States and engaged in United States commerce within the meaning of Section 2(6) of the Act. The Board further concluded that Empresa, by its immediate authority and control over hiring and other terms and

conditions of employment, and UFCO, by its control of Empresa and of the vessels and their operations, were joint employers of the employees covered by the petition. Accordingly, the Board, applying the principle enunciated in *West India Fruit and Steamship Co.*, 130 NLRB 343,[1] held that the maritime operations involved possessed those substantial United States contacts which brought them within the Act's coverage despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects involved (IR. 15–17; IIR. 38–39). The Board therefore concluded that "Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding" (IR. 17; IIR. 39).

The Board ordered that an election be conducted among the employees of the UFCO-Empresa vessels to determine whether they wished to be represented by the NMU, by Sindicato, or by no union (IR. 18; IIR. 40–41).

B. THE COURT PROCEEDINGS

Two suits were then brought, in two different district courts, to enjoin the Board's Direction of Election. On December 12, 1961, Empresa brought suit against the Board's Regional Director in the District

[1] In *West India* (discussed *infra*), the Board held that the Act may be applied to foreign flag vessels where they have substantial points of contact with the United States, and these outweigh their foreign points of contact.

Court for the Southern District of New York,[8] and, on December 16, 1961, Sociedad, the Honduran union, currently representing the seamen, brought suit against the members of the Board in the District Court for the District of Columbia. The complaints alleged that the Board's Direction of Election exceeded its powers under the Act and violated the Constitution, principles of international law, and a treaty between the United States and Honduras (IR. 6; IIR. 4–6). The Regional Director and the Board filed motions to dismiss the complaints on the grounds that the district court lacked jurisdiction over the subject matter, that the request for relief was premature, and that, in any event, the Board's action was proper (IR. 45–46; IIR. 48).[9]

1. THE DECISIONS OF THE NEW YORK COURTS

On December 16, 1961, the district court (Judge Palmieri), after hearing, denied Empresa's motion for a temporary injunction. The court held that, although the allegation that the treaty with Honduras had been violated raised a sufficiently substantial constitutional question to give it jurisdiction to review the Board's Direction of Election under *Fay* v. *Douds*,

[8] The Board, in its Decision, provided that the election should be conducted under the supervision of the Regional Director for the New York Region. He had ordered the election to commence on December 17, 1961. On those vessels arriving in ports of the United States between that date and January 31, 1962, the election was to be conducted in port. On vessels not scheduled to arrive during that period, the election was to be conducted by mail (IR. 18, 2; IIR. 40, 3–4).

[9] In the New York suit, it was also asserted that the members of the Board were indispensable parties defendant (IR. 46).

172 F. 2d 720 (C.A. 2),[10] the mere holding of the election, pending a final determination of the legal issue, would not result in irreparable damage to Empresa (IR. 46–52).

Empresa appealed from this ruling, and, on January 12, 1962, the Second Circuit reversed the district court and held that a temporary injunction should issue (IR. 59–82). The court of appeals (in an opinion by Judge Friendly) first discussed the question of district court jurisdiction. It recognized that, heretofore, the district court had been held to have jurisdiction to review Board representation determinations only where a constitutional question "not transparently frivolous" was presented or where the Board had "acted in plain contravention of a specific mandate of the Act." The court conceded that the instant case did not fall within either of these exceptions; for, "although we conclude that the Board erred, its error was far from 'plain,'" and, since Congress may legislate contrary to the terms of a treaty, the claim that the Board, by impairing the treaty with Honduras, "violated any constitutional rights of plaintiff" was "transparently frivolous." However, the court added that these two categories were not exhaustive of district court jurisdiction; that there was also such jurisdiction "when, as here,

[10] In that case, the Second Circuit held that, although the district court generally was without jurisdiction to review Board action in a representation proceeding at the suit of an aggrieved union, an exception existed where a substantial constitutional question was presented. See also, *Leedom v. Kyne*, 358 U.S. 184, extending that principle to a situation where the Board action violates a plain statutory requirement.

there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a friendly foreign government * * *" (IR. 67–68). Nor, in the court's view, was a different conclusion required by the fact that the suit was brought by an employer, Empresa, who, unlike a labor organization, had a reliable means of obtaining review of the Board's representation decision in the court of appeals, pursuant to Sections 9(d) and 10 (e) or (f) of the Act, when, and if, it became the basis for an order requiring Empresa to bargain with a Board certified representative. The court concluded that a distinction should be drawn "between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line" (IR. 69–70).[11]

The court of appeals then turned to the "merits" and the question of Board power over the vessels involved.[12] The court conceded that Sections 2(6), 2(7)

[11] The court also sought to distinguish the situation here on the ground that, without Sociedad on the ballot, it was not likely that "a victory by a particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was NMU, Sindimar, or 'no-union,' plaintiff would suffer by being obliged to breach its contract with [Sociedad] and, on the allegations of its complaint, to violate Honduran law by doing so" (IR. 69–70).

[12] While we respectfully disagree with the holding of the court of appeals that the district court had jurisdiction, at the suit of the employer, to enjoin the Board from conducting the election herein, we do not believe that this Court will have to

and 9(c) of the Act (*infra*, pp. 63–64) literally cover this case, but added that the words should not be "stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage." The court proceeded to interpret the reach of the Act in accordance with the principles enunciated in *Lauritzen* v. *Larsen*, 345 U.S. 571, which it articulated as follows: the law of the flag is not decisive, but of "cardinal importance," in determining applicable law; "[h]ow 'cardinal' the importance is and how much 'weight' should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied * * *" (IR. 72–73). Applying this test, the court concluded that the National Labor Relations Act did not apply to the vessels involved in this case. In its view (IR. 77):

> The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels'

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reach that question. The District of Columbia suit was brought by a union which does not have the same statutory remedy available to Empresa. *Leedom* v. *Kyne*, 358 U.S. 184, holds that a union can maintain an action in the district court challenging a Board representation proceeding, if it establishes that the Board has clearly exceeded its statutory power. Thus, this Court would, in any event, have to decide the question of Board power in the District of Columbia suit, and its decision there will settle the basic controversy for this case as well.

regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed for the purpose here at issue, by Honduras' interests.[13]

2. THE DISTRICT OF COLUMBIA SUIT

Meanwhile, on January 18, 1962, the District Court for the District of Columbia (Judge Holtzoff) granted a preliminary injunction and denied the Board's motion to dismiss the complaint, in the suit brought against the members of the Board by Sociedad (IIR. 51–67, 68–69). The court held that, "the Labor Management Relations Act of 1947, should be construed as not conferring any authority or power on the National Labor Relations Board to conduct elections for collective bargaining purposes among foreign seamen manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law" (IIR. 67). Thereafter, cross-motions

[13] The court carefully noted (IR. 82) that, "[i]n order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say."

for summary judgment were filed, and the district court granted judgment for Sociedad and made the injunction permanent (IIR. 76–77). The Board appealed this judgment to the court of appeals, and, after the appeal was docketed therein but before hearing or judgment, petitioned this Court for certiorari, which petition was granted (IIR. 78–82).[14]

SUMMARY OF ARGUMENT

I

A. The jurisdictional coverage of the National Labor Relations Act is defined—not in terms of the status of the individual involved or the source of the particular activity—but rather in terms of whether the activity would tend to have an effect upon the foreign or domestic commerce of the United States. A labor dispute on a foreign flag vessel, which, like the vessels here, is regularly engaged in trade or traffic between the United States and other countries, could disrupt the flow of commerce to and from this nation no less than one on an American flag ship. Thus, the Act would literally encompass unfair labor practices and representation questions involving such foreign flag vessels. Nor is the Act rendered inapplicable merely because the vessels fly a foreign flag and are registered in a foreign country; it was settled long ago that Congress has power to regulate conduct occurring thereon, if it so desires. See *Wildenhus'* case, 120 U.S. 1.

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[14] The NMU, which intervened in this suit, also filed a petition for certiorari, which is still pending, No. 141, this Term.

B. However, even where the scope of a domestic statute is such that it can be applied to vessels flying the flag of another nation, general principles of maritime law and international comity require that an accommodation be made so as to minimize the possibility of collision between two sovereignties, each applying its own laws to the transaction. In *Lauritzen v. Larsen*, 345 U.S. 571, a Jones Act case, this Court set forth guide lines for making this accommodation. It held that the conflict between competing laws was to be resolved by "valuing points of contact between the transaction and the states or governments whose competing laws are involved"; that, although the flag was of "cardinal importance" in determining applicable law, it could be outweighed by other factors (*Id.*, at 582, 584–588).

The Board has utilized similar guide lines in applying the National Labor Relations Act to foreign flag vessels. Accepting the premise that a vessel bears the nationality of the flag it flies, the Board has gone on to ascertain whether the foreign vessel has substantial contacts with the United States. If it finds that it does, and the foreign contacts are relatively insubstantial, the Board has concluded that the operations of the vessel affect commerce within the meaning of the Act notwithstanding its foreign nationality; if it finds otherwise, the Board has concluded that the Act is inapplicable. An examination of the Board cases shows that, in general, the Board has held the Act applicable to foreign flag ships where, after evaluation of all aspects of the operation,

it has concluded that the shipping involved is essentially that of this nation rather than a foreign nation.

C. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, is not inconsistent with the conclusion that the Act applies to foreign flag vessels having substantial contacts with the United States. *Benz* merely holds that the Act is inapplicable to a vessel whose only contact with the United States was that it happened to be *temporarily* in an American port.

Application of the Act to foreign flag vessels would not negate the so-called "internal order" doctrine. That doctrine is merely part of the general rule that cardinal weight should be accorded the laws of the flag state; since the flag law doctrine does not preclude the weighing of points of contact, neither would the internal order doctrine. In any event, application of the Act to seaborne commerce would involve no interference with the subjects traditionally encompassed by the internal order doctrine.

Finally, it is immaterial that there is no specific indication in either the terms or the legislative history of the Act that Congress intended to reach foreign flag vessels. The Act contains no express inclusions; hence, there would have been no occasion for Congress to single out such vessels.

II

A. Board assertion of jurisdiction over the vessels here would not contravene the Treaty of Friendship between the United States and Honduras. Article XXII of the Treaty, which gives the consular officer exclusive jurisdiction over controversies involving the internal order of the vessel, merely incorporates

the "internal order" doctrine; as shown, Board determination of a bargaining representative does not impinge on the area normally encompassed by that doctrine. Article X provides that the Honduran flag shall be proof of the Honduran nationality of the vessel; the Board does not deny the vessel's foreign nationality but only decides that, in view of the vessel's substantial contacts with the United States, it should nonetheless be subjected to the labor laws of this nation.

B. There is no substantial basis for the Department of Defense's assumption that defense policies would be subverted by Board assertion of jurisdiction over vessels flying the flags of Panama, Liberia or Honduras (the Panlibhon fleet). Moreover, the highly speculative consequences to our effective control over Panlibhon shipping are more than outweighed by the detrimental effects of not applying the Act on the important objectives of achieving a peaceful resolution of labor disputes and the development of a uniform national labor policy.

C. Nor is there any substantial basis for the fear, voiced by the Department of State, that application of the Act to foreign flag ships having substantial contacts with the United States would unsettle international relations.

III

The Board properly concluded that the vessels here had sufficient points of contact with the United States to bring them under the Act. The contrary conclusion of the court of appeals in Nos. 91 and 93 stems from its rejection of the Board's finding that United Fruit was a joint employer of the seamen on the

Empresa vessels. In view of the evidence showing that Empresa was part of an integrated operation owned and controlled by United Fruit, the court's action was erroneous. Accepting the Board's findings, it is clear that Empresa's shipping operation was not that of a truly foreign venture serving the shipping needs of a foreign country, but rather only an incident of the operations of an American corporation, United Fruit, which utilized the Empresa vessels to engage in the foreign commerce of this nation.

ARGUMENT

INTRODUCTION

During the past ten years, the shipping needs of the United States have been met more and more by use of vessels—like those here—which are registered in and fly the flags of certain small foreign nations (principally Panama, Liberia and Honduras), and have a crew comprised of foreign nationals.[15] These vessels are referred to as "flag of convenience" or

[15] As of July 1959, a total of 518 vessels, aggregating over 10 million deadweight tons, owned and/or controlled by American interests, were registered under the flags of Panama, Liberia or Honduras (referred to as the Panlibhon countries), while the United States-flag merchant fleet totaled 2,847 private and government-owned vessels of 33½ million deadweight tons. Of the vessels under United States flag, only 206 were of post-World War II construction, the remainder being inactive or largely obsolete. See *The Role of the U.S. Merchant Marine in National Security*, National Academy of Sciences-National Research Council, Publication 748 (1959), hereafter called *Project Walrus Report*, p. 10; *Panlibhon Registration of American-Owned Merchant Ships*, 60 Col. L. Rev. 711, 715 (1960). As of January 1961, the total American-owned and/or controlled ships under Panlibhon registry was 456, aggregating over 11 million deadweight tons. See Dye, *Flags of Convenience; Mari-*

"flag of necessity" ships. Many of the ships are owned and/or controlled by American interests (n. 15, *supra*), and were either transferred from American registry or were constructed in foreign shipyards and placed under foreign registry to begin with.[16] The American-controlled vessels are employed primarily to carry products and materials which are utilized in the business operations of the American beneficial owner,[17] and they either never visit the flag country or, as here, do so only in connection with the business of the American beneficial owner,

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time Dilemma, United States Naval Institute Proceedings (February 1962), 76, 83.

In addition to the American-owned and/or controlled ships, there were under Panlibhon registry, on December 31, 1960, another 1,397 ships of over 23 million deadweight tons. *An Analysis of the Participation of U.S. and Foreign-Flag Ships in the Oceanborne Foreign Trade of the United States*, U.S. Department of Commerce, Maritime Administration (1962), 4.

[16] Current procedures of the Maritime Administration of the U.S. Department of Commerce permit the transfer of vessels from American to foreign registry, provided that ultimate American ownership and control are maintained and it is agreed that the ships would be made available to the United States in the event of national emergency. New ships are not subject to these restrictions; a prospective American shipowner is free at any time to build a ship in a foreign shipyard, and he need not seek permission from the Maritime Administration before registering it in a foreign country. However, many of these new ships are considered under effective United States control, for their beneficial owners have voluntarily agreed to submit them to such control in time of emergency. See *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 500–502 (1960); *Panlibhon Registration of American-Owned Merchant Ships*, 60 Col. L. Rev. 711, 718–721 (1960).

[17] The Project Walrus Report points out that (p. 9): "'Flag of convenience' ships account for 70 percent of U.S. total ton-

The increasing use of these foreign flag vessels by American interests is attributable to the following: (1) tax savings (profits accruing from the shipping operations are not taxed in the United States until such time as they may be distributed to American shareholders); (2) labor cost savings (the wages of foreign seamen are substantially lower than those of American seamen); and (3) various incidental savings (e.g., lower insurance rates, lower costs for ship repairs, avoidance of U.S. maintenance standards). As a result of these foreign registrations, employment on American-flag vessels has dropped sharply—from 158,860 positions in 1945, to 84,300 in 1951, to 57,507 in 1955, and to 49,281 in 1960.[10]

In an effort to protect their labor standards against the threat imposed by this foreign competition, the American maritime unions have sought to organize the seamen on the "flag of convenience" vessels. They have been met with resistance by the shipowners

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nage in dry bulk cargo carriers and about one-half of U.S. total tonnage in tankers." Most of the tanker tonnage (about 7 million deadweight tons) consisted of ships owned by American interests (*Id.*, 55). Similarly, the Maritime Administration has noted that, in 1960, Panlibhon ships accounted for 39 percent of the total oceanborne foreign trade of the U.S. and ships under "effective U.S. control" accounted for 23.3 percent of the total. *Oceanborne Foreign Trade, op. cit.*, 4. The *Maritime Transport Report* (May 2, 1961), issued by the Organization for European Economic Co-Operation, states (p. 53) that the Liberian fleet, which 10 years ago accounted for less than 1 percent of the world's tankers, ranked in mid-1960 as the world's largest tanker fleet and second largest in terms of tanker tonnage new or less than 5 years old.

[10] See *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 499–500, 502–503 (1960).

who have refused to recognize them as the representatives of their seamen, and, in some cases, have engaged in unfair labor practice conduct to discourage unionization. The unions have responded by filing representation petitions and unfair labor practice charges with the Board, and by resorting to picketing and other economic weapons.

The question presented is whether the Board may properly apply the National Labor Relations Act to representation questions and unfair labor practice questions involving these foreign flag vessels. It is the position of the respondents in Nos. 91, 93, and 107, and the district court in No. 107, that the Act has no application whatever to foreign flag vessels of the type here. It is the position of the Board, on the other hand, that the applicability of the Act to a foreign flag vessel depends on weighing the vessel's points of contact with the United States against those with the flag country, and, if the former preponderate, the vessel comes within the ambit of the Act. This principle was accepted by the court of appeals in Nos. 91 and 93, but the court concluded, contrary to the Board, that the points of contact with the flag country of the vessels involved were sufficient to outweigh those of the United States.

We show below that: (1) the Act may properly be applied to foreign flag ships which have substantial points of contact with the United States, and these outweigh the foreign contacts; (2) application of the Act to such vessels would not impair treaty obligations, nor adversely affect national defense or international relations; and (3) the Board properly concluded that the vessels here were subject to the Act.

I. THE NATIONAL LABOR RELATIONS ACT MAY PROPERLY BE CONSTRUED AS APPLYING TO VESSELS FLYING THE FLAGS OF OTHER NATIONS, WHERE THEY HAVE SUBSTANTIAL POINTS OF CONTACT WITH THE UNITED STATES AND THESE OUTWEIGH THE FOREIGN CONTACTS

A. The literal terms of the Act cover labor disputes involving foreign flag vessels which are engaged in commerce between the United States and foreign nations

Section 10(a) of the National Labor Relations Act empowers the Board to prevent unfair labor practices "affecting commerce," and Section 9(c) confers power to resolve representation questions "affecting commerce." Section 2(6), in relevant part, defines "commerce" as "trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State, Territory, or the District of Columbia." Section 2(7) defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Moreover, Section 1 of the Act declares the policy of eliminating practices "which have the intent or the necessary effect of burdening or obstructing commerce," and of establishing a system of law which "safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce." And, this Court has pointed out that: "The Act on its face * * * evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce. * * *" *National Labor Re-*

lations Board v. *Fainblatt*, 306 U.S. 601, 607.[19] It "is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion [for determining the jurisdictional coverage of the Act]." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 222.

In view of the breadth of the terms defining the jurisdictional reach of the Act,[20] and of the other indications that coverage turns, not on the source of particular activity, but rather upon the effects which it would have upon the foreign and domestic commerce of the United States, it cannot be assumed that Congress intended the Act to operate only within the territorial limits of the United States.[21] Accordingly, the Act has consistently been held applicable to American flag ships, even while they were operating outside the territorial limits of the United States. See *National Labor Relations Board* v. *Waterman*

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[19] See also, *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647; *Guss* v. *Utah Board*, 353 U.S. 1, 3–4.

[20] The terms "employer," "employee" and "labor dispute"—defined in Sections 2(2), 2(3) and 2(9)—have similar breadth. Thus, the Act has been held applicable to non-resident alien employees, while employed in the United States. See *Brown Company*, 109 NLRB 173; *Italia Societa*, 118 NLRB 1113, 1117.

[21] There is a general canon that legislation should be construed to operate only within the territorial limits of the United States. See *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285; *Blackmer* v. *United States*, 284 U.S. 421, 437. Congress, however, has power to regulate activity occurring beyond those limits where such activity would have an impact on the economy of the United States. An intention to exercise that power is manifested where, as here, an "effects" test of jurisdiction is used. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377; *Steele* v. *Bulova Watch Co.*, 344 U.S. 280; *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 704–705.

Steamship Co., 309 U.S. 206; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656. Cf. *Grace Line Inc.*, 135 NLRB No. 70. The same considerations would lead to the conclusion that the Act also encompasses unfair labor practices and representation questions involving foreign flag vessels which, like the vessels here, are regularly engaged in trade or traffic between the United States and other countries. As the court of appeals recognized (IR. 80–81), American unions have a vital interest in labor conditions on such vessels (see also, pp. 18–21, *supra*), and a labor dispute between the unions and the vessels could disrupt the flow of commerce to and from this nation no less than one on an American flag ship.

Nor is the Act rendered inapplicable merely because the vessels fly a foreign flag and are registered in a foreign country. Although vessels are deemed to be part of the country whose flag they fly, the courts below properly noted (IR. 73; IIR. 56–60) that Congress nevertheless possesses power to regulate conduct occurring thereon. In the words of the court of appeals (IR. 73): "The Board is right in saying the scope of its power in respect of [foreign flag ships] is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere 'figure of speech' whose fictitious character was exposed long ago, *Wildenhus's Case*, 120 U.S. 1 (1887); *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123–124 (1923)."

B. However, in accordance with general principles of maritime and international law, the Board has balanced the foreign vessel's points of contact with the various nations involved, and has applied the Act only where the American contacts preponderate

However, even where the scope of a domestic statute is such that it can be applied to vessels flying the flag of another nation, general principles of maritime law and international comity require that an accommodation be made so as to minimize the possibility of collision between two sovereignties, each applying its own laws to the transaction. In *Lauritzen* v. *Larsen*, 345 U.S. 571, this Court set forth guide lines to aid the courts in determining the extent to which domestic statutes with general jurisdictional provisions may properly be applied to shipping operations having foreign aspects. In holding that the Jones Act (46 U.S.C. 688)—which gives a right of action for damages in the federal courts to "any seaman who shall suffer personal injury in the course of his employment"—was not applicable to a suit brought by a Danish seaman who was hired in the United States and who suffered an injury aboard a Danish flag ship while it was in Cuban waters, the Court pointed out that (345 U.S. at 582):

> Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. * * *

The Court then enumerated seven factors which could conceivably influence the choice of law to govern a maritime tort claim,[22] and evaluated the weight and significance to be accorded to each. It concluded that the flag was of "cardinal importance" and "overbears most other connecting events in determining applicable law" (*Id.* at 584–585). The Court added, though, that the allegiance or domicile of the injured seamen or the allegiance of the shipowner were also entitled to weight, and might in an appropriate case override the flag and warrant application of the laws of the seaman's or the shipowner's state (*Id.* at 586–588).[23] But, finding that these factors were not present in *Lauritzen*, the Court held that the contacts with the United States were insufficient to override the law of Denmark, the flag country, which allowed the injured seaman a lesser measure of recovery than the Jones Act.[24] See also *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382–384.[24a]

[22] These were: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; and (7) the law of the forum.

[23] In establishing that the allegiance of the shipowner was an important factor, the Court noted that (*Id.* at 587): "* * * it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them. * * *"

[24] See, however, *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (C.A. 2), certiorari denied, 359 U.S. 1000; *Southern Cross Steamship Co.* v. *Firpis*, 285 F. 2d 651 (C.A. 1), certiorari denied, 365 U.S. 869; *Zidanski* v. *Empresa Hondureña de Vapores*, 113 F. Supp. 93 (S.D.N.Y.).

[24a] A similar approach is used by the Court in determining which of two conflicting state laws shall govern, where both states

The Board has utilized similar guide lines in applying the National Labor Relations Act to foreign flag vessels. Accepting the premise that a vessel bears the nationality of the flag it flies, the Board has gone on to ascertain whether the foreign vessel has substantial contacts with the United States. If it finds that it does, and that the foreign contacts are relatively insubstantial, the Board has concluded that the operations of the vessel affect commerce within the meaning of the Act notwithstanding its foreign nationality; if it finds otherwise, the Board has concluded that the Act is inapplicable. An examination of the cases thus far decided by the Board illustrates how the Board has applied these principles:

1. *West India Fruit and Steamship Co.*, 130 NLRB 343, and *Owens-Illinois Glass Company*, 136 NLRB No. 32.[25]—The vessels in these cases were owned directly by an American corporation and made regular trips between the United States and the Caribbean, carrying cargo;[26] they were provisioned and fueled in the United States, and drydocked and re-

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have an interest in the transaction. See *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66; *Alaska Packers Ass'n v. Industrial Comm'n*, 294 U.S. 532.

[25] This decision is set forth in Appendix B, *infra*, pp. 68–74.

[26] In *West India*, the vessel carried boxcars loaded with American products from Belle Chase, Louisiana to Havana, Cuba; in Havana, the cars were placed ashore and sent to their ultimate consignees who unloaded them; they were then reloaded, mostly with sugar, placed back aboard the vessel, and returned to Belle Chase, from where they were sent to the American consignees. In *Owens Illinois*, the vessels carried pulpwood from the Bahamas to Jacksonville, Florida, for use in *Owens'* American operations.

paired there. However, the vessels were registered in, and flew the flag of, Liberia,[27] and the crew members were foreign nationals who did not reside in the United States, and they signed shipping articles of the flag country. But, the vessels never visited the flag country, did not carry any of its trade, and the crew members were not necessarily citizens of the flag country. In these circumstances, the Board concluded that the vessels possessed sufficient contacts with the United States to bring them within the reach of the Act.[28]

2. *Peninsular & Occidental Steamship Co.*, 132 NLRB 10,[29] and *Eastern Shipping Corp.*, 132 NLRB 930.—The vessels in these cases were primarily passenger cruise ships, which made regular trips between Miami, Florida and various ports in the Caribbean, taking aboard most of their passengers in Miami and returning them there at the end of the

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[27] Except for one of the boats in *Owens-Illinois*, which was registered in, and flew the flag of, Honduras.

[28] *West India* was an unfair labor practice case, the charges having been filed by an American union which was seeking to organize the seamen employed on the vessel; the Board found that the employer had engaged in conduct violative of Section 8(a) (1) and (3) of the Act; its order is pending before the Court of Appeals for the Fifth Circuit, on the Company's petition to review, No. 18929. *Owens-Illinois* was a representation case, initiated by an American union seeking to represent the seamen involved; the Board directed an election, which was enjoined by the District Court for the District of Columbia; the case is now on appeal before the Court of Appeals for the District of Columbia Circuit. *Owens-Illinois Glass Co.* v. *McCulloch*, 50 LRRM 2041 (D.D.C.), April 13, 1962, appeal pending (C.A.D.C.), No. 17040.

[29] For an earlier phase of this case, see 120 NLRB 1097.

voyage. The vessels flew a foreign flag and their crew members were non-resident foreign nationals.[30] But, as in *West India* and *Owens-Illinois*, the vessels never visited the flag country, and did not carry any of its trade; they were provisioned, fueled and drydocked and repaired in the United States. However, unlike in the other two cases, they were not owned directly by an American, but by a foreign corporation. The Board found this difference not to be material, because the foreign corporation was either a mere instrumentality of an American corporation, or shared control over the shipping venture with an American corporation.[31] Accordingly, the Board concluded that the ves-

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[30] In *Peninsular & Occidental*, the flag and registry was Liberian, while in *Eastern* it was Panamanian. The crew signed American shipping articles in the former case, and Panamanian articles in the latter.

[31] Thus, in *Peninsular & Occidental*, the ship was owned by Blue, a Liberian corporation, which chartered it to Green, another Liberian corporation, and Green in turn subchartered it to Peninsular. The Board found that Blue and Green were wholly owned by, and were mere instrumentalities of, Peninsular, which in fact had full control of the vessel and was its beneficial owner. In *Eastern*, the ship was owned by McCormick, a Panamanian corporation, 95 per cent of whose stock was owned by neither citizens nor residents of the United States. McCormick entered into a contract with Eastern—an American owned corporation—whereby the latter agreed to serve as exclusive agent for McCormick, with responsibility for the sale of passenger tickets and sales promotion; purchasing materials and supplies for the ship; handling repairs; providing sufficient dockage and warehouse space; and clearing the ship and its passengers through immigration, customs and other port authorities. The Board found that McCormick and Eastern were a single integrated enterprise, in which the various activities essential to the success of the shipping venture were divided between the two companies.

sels involved possessed sufficient points of contact with the United States to render the Act applicable.[32] As the Board stated in *Eastern* (132 NLRB at 938), the "contacts with the United States are not simply the concomitance of the international seaborne traffic of a truly foreign commercial venture. On the contrary, the facts show that the * * * enterprise * * * is essentially a domestic, United States operation, the primary purpose of which is to participate in the commerce of this Nation."

3. *Hamilton Bros.*, 133 NLRB No. 85.—The vessels in this case, a representation proceeding, were owned by an American corporation, and they were engaged in regular trips between Tampa, Florida and various Central American countries. They carried bananas and coconuts for the corporation's account from the latter and export cargo on the return trip. One vessel was of Honduran registry and the other of Nicaraguan or Honduran registry; the crews were principally Nicaraguan, Costa Rican and Honduran, and they were hired both at Tampa and in foreign ports. The home port of the vessels was Tampa, where they were repaired and serviced. The difference between this case and prior cases, however, was

[32] In *Peninsular & Occidental*, which was an unfair labor practice case, the Board proceeded to find that the Company had, *inter alia*, refused to bargain with an American union, which had been certified by the Board, in violation of Section 8(a)(5) of the Act; the Board's order is pending before the Court of Appeals for the Fifth Circuit on the Board's petition for enforcement, No. 19451. In *Eastern*, which was a representation case, the Board directed an election on the petition of an American union, which election the union subsequently lost.

that the vessels did trade with the nations of their registry (Honduras and Nicaragua), and the union seeking representation rights with respect to the seamen involved was a Honduran union. The Board nonetheless found that the points of contact with the United States were sufficient to outweigh the foreign points of contacts, and held the Act applicable to the vessels.[33] Respecting the trade with the flag countries, the Board stated (133 NLRB No. 85, p. 3): "Clearly, such foreign trade contacts of the vessels as may exist with any particular foreign nations, whether their flag state or not, are merely a concomitance of the Employer's shipping operations in the area of American international trade. Consequently, they do not create, either alone or in conjunction with the other attendant foreign contacts, such substantial connections with important interests of any foreign nation as to require a finding that the operations are essentially the shipping of a foreign nation and, thus, outside the coverage of the Labor Act." And, respecting the petitioning union's organization under the laws of Honduras, the Board added, "such incorporation does not alter the fact that American shipping is involved in this proceeding, nor does it convert what is here a domestic dispute concerning the representation of employees in American foreign commerce into a foreign labor matter outside the Act" (*ibid.*).

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[33] The Board directed a representation election in a single unit covering both ships. Subsequently, the Honduran union, which had sought a separate election for each ship, withdrew its petition.

As we show *infra*, pp. 54–55, essentially the same factors are present in the *United Fruit Company* representation case, 134 NLRB No. 25 (IR. 9–9; IIR 31–41), which is the subject of this litigation.

4. *Dalzell Towing Company*, 137 NLRB No. 48.[34]—This was a representation proceeding initiated by an American union, seeking to represent the seamen on the Panamanian flag ship, *Estrellita*. The ship was owned by a Panamanian corporation, Suffolk, a wholly owned subsidiary of Oil Transfer, an American corporation, and the two companies had interlocking directors and officers. From offices in New York which it shared with Oil Transfer, Suffolk chartered the *Estrellita*, a tanker, on the world market, for the conveyance of oil, water, molasses and chemicals.[35] The tanker has been chartered by both domestic and foreign corporations. Since her transfer to Suffolk in 1957, the *Estrellita* has spent only about 26 percent of her total operation time in voyages on which she entered United States ports.[36] The Board found that Suffolk was merely an instrumentality of Oil Transfer, and thus, despite Panamanian incorporation, Suffolk was essentially a domestic United States

[34] This decision is set forth in Appendix B, *infra*, pp. 75–81.

[35] Oil Transfer, which formerly owned the *Estrellita* when it was under American registry, is engaged in the operation of American flag vessels carrying bulk liquids in United States coastal trade.

[36] During the first two years of such operations, the tanker remained almost exclusively in Sumatra working under charter to a Dutch oil company. However, during the year preceding the filing of the representation petition, she was chartered primarily to American shippers and thus a large majority of her voyages touched United States ports.

enterprise. Nevertheless, the Board concluded that the *Estrellita* did not have such substantial contacts with the United States as would render the Act applicable.

The Board pointed out that, in applying the substantial contacts test, the problem is one "of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation * * *" (137 NLRB No. 48, p. 3, quoting from *United Fruit Company*, 134 NLRB No. 25, p. 3). Thus, the Board explained that it has looked to the national connections of a ship's owner-operator insofar as these may show the nationality of the commercial activities in which the ship is involved. But, in the Board's view, "The situation here is different, however, in that it is the business operations of the charterers, who may or may not be U.S. nationals, and not that of Suffolk, which determines in what commerce the *Estrellita* will sail. Indeed, under the type of charter operations here involved, the U.S. connections of the owner-operator, though showing some U.S. interest in the ship, do not in themselves demonstrate sufficiently substantial U.S. contacts to confer jurisdiction. Simarly, the physical contacts of the vessel to the United States do not evince substantial ties to the commerce of this nation. Thus, the physical contacts derive not from the connection which the ship and its operation have to the owner-operator's fixed U.S. enterprise, but rather from the charter's business; and the charterer, to reiterate, is whoever

happens to charter the vessel" (137 NLRB No. 25, p. 4).[37]

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In sum, the Board has held the Act applicable to foreign flag ships, where, after evaluating all of the aspects of the operation, it has concluded that the shipping involved is essentially that of this nation rather than of a foreign nation. In making this evaluation, the Board has looked at such factors as: (a) the nationality of the beneficial owner of the ship; (b) whether the operations of the ship are directed primarily from the United States; (c) the regularity and frequency of its visits to United States ports, and the nature of the cargo and passengers carried; (d) where the ship is provisioned and repaired; and (e) whether the ship carries the trade of its flag country, and, if so, whether such trade is merely a concomitance of the American beneficial owner's business operations. We submit that the line drawn by the Board, between foreign flag ships which come under the Act and those which do not, is a reasonable one. It results in bringing within the Act those ships which, despite their foreign registration and foreign crew, are closely

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[37] The Board distinguished the situations in *United Fruit* and *Peninsular & Occidental*, "where the foreign corporations chartered their vessels only to U.S. corporations to which they were related for the continuing use of such corporations as an adjunct of their U.S. located commerce. Consequently, the ships by the very nature of the business in which they were involved regularly traded with U.S. ports, and barring some wholly unforeseen change would continue to do so" (137 NLRB No. 25, p. 4, n. 8).

linked with the American economy, while, at the same time, it results in excluding those which are not. Furthermore, the test applied by the Board is a workable one (cf. *Amicus* Brief of the United Kingdom in Nos. 91 and 93, p. 8, Brief for Petitioner in No. 33, pp. 35–36). The cases already decided have indicated

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[58] There is no basis for the fear that the Board's test would even bring the *Queen Mary* under the Act (see Brief for Petitioner in No. 33, this Term, pp. 33–34). The fact that a vessel makes regular visits to United States ports is only one factor to be considered, and, in the case of a vessel like the *Queen Mary*, it is clearly outweighed by the other factors which show that the shipping operation is truly, not that of the United States, but of a foreign nation—e.g., British flag, British crew, British ownership and direction, engaged in substantial British trade. See *Eastern Shipping Corp.*, 132 NLRB 930, 933; *United Fruit Company*, 134 NLRB No. 25, p. 3, n. 10 (IR. 16, IR. 39); *Dalzell Towing Co.*, 137 NLRB No. 48, p. 4, n. 7; Brief for Respondent in No. 33, this Term, pp. 22–23.

On the other hand, the Board is of the view that it is not so clear that the vessels involved in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, No. 33, this Term, do not possess those substantial ties with the United States which would bring them under the Act. Thus, although they are owned by an Italian corporation, they operate similar to the cruise ships in *Eastern*, *supra*, and they appear to have a similar relationship with an American agency. See Brief for Respondent in No. 33, this Term, pp. 4–8; Record in No. 33, p. 285. Accordingly, the Board believes that the Court of Appeals of New York correctly concluded that the operations of the Incres vessels were "arguably" subject to the NLRA, and hence, under familiar preemption principles, the state courts were without jurisdiction to enjoin the union's organizational activities with respect to those vessels. This Court's recent decision in *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, shows that the preemption principles apply to questions of the Act's coverage and jurisdiction no less than to questions of substantive law, at least where, as here, the question requires the evaluation of facts and criteria by the Board.

the relevant factors and they are capable of ready ascertainment; hence, by now it can be determined, with a fair degree of accuracy, whether a particular foreign flag vessel is within or without the ambit of the Act, and, as more cases are decided by the Board, the answer will become even more certain.

C. Neither this Court's decision in Benz, *the so-called "internal order doctrine," nor the fact that the Act does not specifically refer to foreign flag vessels precludes application of the Act to such vessels*

1. The conclusion that the Act applies to foreign flag vessels having substantial contacts with the United States is not inconsistent with *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138. That case involved the *S.S. Riviera*, a vessel owned by a Panamanian corporation, sailing under the Liberian flag. It was manned by a foreign crew, primarily German and British, who had signed a British form of articles at Bremen, Germany, under which the crew agreed to serve on a two-year voyage originating at Bremen and terminating at a European port. While the vessel was temporarily docked at Portland, Oregon, for repairs and to load a cargo of wheat, the crew struck over wages and conditions on the ship, and three American unions picketed the vessel. A diversity suit was brought in a Federal district court in Oregon, for an injunction and damages against representatives of the three unions. The district court enjoined the picketing and awarded damages.[39] By the time the case came to this Court, the vessel had sailed, and, as far

[39] The judgments were predicated upon the theory that the picketing was for an unlawful purpose under Oregon law.

as appeared, had never again returned to an American port. This Court, rejecting the contention that the Act applied to the controversy and that the district court thus lacked jurisdiction, sustained the judgment for damages.

The Court pointed out that, although Congress had power to apply the Act to labor conditions on a foreign ship, in view of the delicate problems of international relations which this would create clear evidence of such an intent should be required. In the Court's view, there was no indication that Congress intended to bring disputes like the one presented within the coverage of the Act. The Court's opinion could be read as a flat holding that the Act is inapplicable to all foreign flag ships. We do not believe, however, that the Court intended to decide more than the fact situation before it. Thus, at the outset of its opinion, the Court stated that the only question decided was whether the Act "applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is *temporarily* in an American port" (353 U.S. at 138-139, emphasis added). And, later on, the Court added that the dispute "arose on a foreign vessel * * * was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was *transiently* in a United States port and American labor unions participated in its picketing" (353 U.S. at 142, emphasis added). In these circumstances, and since the

Court was not afforded an opportunity to consider the problem in all of its various forms, we interpret *Benz* as deciding merely that the Act was inapplicable to a foreign flag ship whose points of contact with the United States were as insubstantial as those of the vessel there.[40]

Benz has been so interpreted by all of the courts which have had occasion to consider it, with the exception of the District Court in No. 107 which interpreted it broadly (IIR. 65–66). Thus, the court of appeals in Nos. 91 and 93, the court in *Incres*, No. 33 (including Judge Fuld who dissented),[41] and the Pennsylvania Supreme Court in *Navios Corp.* v. *National Maritime Union*, 402 Pa. 225, 116 A. 2d 625, certiorari denied, 366 U.S. 905,[42] have all viewed *Benz* as not ruling out the applicability of the Act to foreign flag ships having substantial points of contact with the United States. Moreover, in *Marine Cooks* v. *Panama Steamship Co.*, 362 U.S. 365, this Court emphasized the limited nature of *Benz*, in holding that the Norris-La Guardia Act barred the issuance of an injunction in a labor dispute involving a foreign flag ship. The Court stated that *Benz* decided only that

[40] It is appropriate to recall that the doctrine of the particular case "is not allowed to end with its enunciation and * * * an expression in an opinion yields later to the impact of facts unforeseen." *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 619 (Brandeis, J. dissenting).

[41] See the Record in No. 33, pp. 288, 293–294.

[42] In *Navios*, it was held that the state court lacked jurisdiction to enjoin picketing by an American union of a Liberian ship, which was owned by a foreign subsidiary of United States Steel Corporation and was utilized to carry iron ore from Venezuela to the latter's plant in Pennsylvania. The controversy was found "arguably subject" to the NLRA.

the Act did not govern "the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened *temporarily* to be in American waters" (362 U.S. at 369, emphasis added).

2. In the foreign flag cases before the Board, including the one involved in this litigation, it has been urged that the points of contact principle articulated in *Lauritzen, supra*, though appropriate for determining the law applicable to maritime tort claims, are not appropriate for a statute governing labor relations. Such a statute, the argument runs, entails regulating the "internal order" of a ship, and, under principles of international law, jurisdiction over these matters rests exclusively with the flag state. There is no merit to this contention.

First, the internal order doctrine appears to be nothing more than a part of the general rule that cardinal weight should be accorded the laws of the flag state. For, in *Lauritzen*, this Court discussed the internal order doctrine simply as part of its discussion of flag law generally (see 345 U.S. at 584–586). Accordingly, if, as we have shown, the flag law doctrine would not preclude the weighing of points of contact, neither should the internal order doctrine.

Second, even if the internal order doctrine were entitled to separate consideration, it would have no application here. The historical statement of the doctrine is that "all matters of discipline and all things done on board which affected *only* the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of

the port, should be left [to the authorities of the flag nation]." [Emphasis added.] *Wildenhus' Case*, 120 U.S. 1, 12. See also, *United States* v. *Flores*, 289 U.S. 137, 158; *Lauritzen* v. *Larsen*, 345 U.S. 571, 585–586. A labor dispute involving a foreign flag ship having substantial contacts with the United States extends well beyond the internal economy of the vessel. It would tend to obstruct the flow of commerce into the United States, thereby disrupting "the peace * * * of the country [and] the tranquility of the port." And, it would clearly be a matter of vital concern to American seamen working on American ships. See *Marine Cooks & Stewards* v. *Panama Steamship Company*, 362 U.S. 365, 371.

Moreover, it cannot be assumed "that application of the Labor Act to seaborne commerce involves any interference in the internal order and discipline of a vessel—at least of the kind that the internal order doctrine is intended, under appropriate circumstances, to preclude." *West India Fruit and Steamship Co.*, 130 NLRB 343, 357. The purpose of the doctrine is to preclude limitations on the traditional right of the master of a vessel to punish mutiny and otherwise discipline his crew, and to control the passengers.[42a] The Board has no power under the Act to intrude on these matters. Cf. *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31; *P & O Steamship Co.* v. *National Labor Relations Board*, 98 F. 2d 411 (C.A. 5), certiorari denied, 305

[42a] See McDougal, *et al.*, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. Int'l law 25, 82–84 (1960).

U.S. 653. As the Board pointed out in *West India*, 130 NLRB at 357:

> Clearly, there is nothing in the Act that prescribes what working conditions must exist upon a vessel or directs a shipowner or a master as to the manner in which the disciplinary problems shall be handled. To be sure, the Act's bargaining obligation may indirectly result in such matters being dealt with in a labor agreement, but the terms of such an agreement at least to the extent they deal with internal order and discipline are the private agreements of the parties to the contract; they are not prescribed by any provision of the Act.

3. Nor is there merit to the contention (see Brief of Petitioner in No. 33, pp. 27–32) that the Act should not be construed to cover foreign flag vessels because there is no specific indication, in either its provisions or legislative history, that Congress intended to cover such vessels. The fact that the Act does not specifically include foreign flag vessels can hardly be decisive, for the statute contains no express inclusions; rather, the plan of the statute is that jurisdictional coverage shall be determined—except for certain well stated exceptions (see Sections 2(2) and 2(3))—not by the character or location of the operation involved, but by its "effect" upon commerce (see supra, pp. 22–24).[43] Indeed, in neither the Jones Act (construed in *Lauritzen, supra*) nor in the Seamen's

[43] As Mr. Justice Holmes observed in an analogous situation, "the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them." *Unwin* v. *Jarka Co.*, 282 U.S. 234, 239.

Act of 1951 and the amendments thereto (construed in *Sandberg* v. *McDonald*, 248 U.S. 185, and *Strathearn Steamship Co.* v. *Dillon*, 252 U.S. 348, see IR. 74), did Congress specifically indicate whether, and to what extent, it desired to cover foreign flag ships; it merely used general language, thereby leaving it to the courts to determine the issue in the light of the nature and purpose of the enactment, and the factors of United States and foreign interest present.

The Maritime Labor Act does not require a contrary conclusion. That statute (52 Stat. 965 (1938), amended 55 Stat. 259 (1942))—which is no longer in effect—set up a Maritime Labor Board for the purpose of mediating maritime labor disputes, encouraging the making and maintenance of written collective agreements in that industry, and preparing a comprehensive plan for the amicable adjustment of maritime disputes. Since this statute was viewed as a supplement to the NLRA and it was expressly limited to vessels "documented, registered, licensed or enrolled under the laws of the United States," it has been argued that this shows that Congress must have intended to limit the NLRA to these kinds of vessels too. But, since the MLA was enacted subsequent to the NLRA and contains limiting language while the latter does not, it is more reasonable to conclude that it was only with respect to the relatively narrow functions conferred on the Maritime Labor Board that Congress desired to limit coverage to American flag vessels. In this connection, it is significant that the MLA specifically provided (Sec. 1002) that: "The provisions of this title shall not in any

manner affect or be construed to limit the provisions of the National Labor Relations Act, nor shall any of the unfair labor practices listed therein be considered a dispute for the purposes of this title. Questions concerning the representation of employees of a maritime employer shall be considered and determined by the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act."

Moreover, it should be noted that in 1959 Congress enacted Section 14(c)(1), which provides that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." Under those standards, the Board would have asserted jurisdiction over foreign flag vessels engaged in the volume of commerce, and having the substantial United States contacts, of those here. Thus, as of August 1, 1959, the Board had determined that it would assert jurisdiction over all "freight enterprises engaged in the furnishing of interstate transportation services which derive at least $50,000 gross revenue per annum from such operations." *H.P.O. Service, Inc.*, 122 NLRB 394." And, the Board had already exercised jurisdiction over, and ordered elections on, the Peninsular & Occidental foreign flag ships discussed *supra* (120 NLRB 1097), and a complaint had been issued in the *West India* case, *supra*.

"There is evidence that Congress was familiar with this standard. II Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 (G.P.O., 1959), 1153(3)-1154(3): 105 Cong. Rec. 6548-6549.

II. APPLICATION OF THE ACT TO FOREIGN FLAG VESSELS WOULD NOT IMPAIR TREATY OBLIGATIONS, NOR ADVERSELY AFFECT NATIONAL DEFENSE AND INTERNATIONAL RELATIONS

A. *Application of the Act would not impair treaty obligations*

In the courts below (IR. 6, 63–64; IIR. 5, 42–43), it was asserted that application of the Act to the vessels here would impair the obligations contained in the Treaty of Friendship, Commerce, and Consular Rights between the United States and Honduras, signed on December 7, 1929, and proclaimed on July 23, 1928. Thus, Article XXII of the treaty provides in part as follows (45 Stat. 2634):

> A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

The representation proceeding before the Board, it is argued, abridges this provision for it will affect the internal order of the vessels involved, and thereby invade the exclusive jurisdiction of the Honduran Consul over this subject. But, as we have shown (pp. 39–41), Board determination of a bargaining representative does not impinge on the area normally encompassed by the internal order doctrine. Moreover, the treaty provision itself confirms that wages

and working conditions embodied in a contract are not aspects of a vessel's internal order. The provision vests the Consul with the exclusive jurisdiction over matters arising out of the internal order and matters pertaining to discipline, but eliminates the "exclusive" factor, and provides in effect for concurrent jurisdiction, in matters pertaining to wages and the execution of contracts.

Nor does Board assertion of jurisdiction impair Article X of the treaty, which provides (45 Stat. 2625):

> Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

This provision states no more than that the Honduran flag flown by the vessels here and their possession of Honduran registration papers are absolute proof of their Honduran nationality. But, as already pointed out, the Board, in asserting jurisdiction over a foreign flag ship, does not deny the vessel's foreign nationality but merely decides that, in view of the vessel's substantial contacts with the United States, it should be subjected to the labor laws of this nation.[45] As the Board stated in *West India Fruit & Steam-*

[45] Honduras, for example, would of course remain free to continue to regulate the registration forms of the vessel, collect fees and taxes, and provide for consular protection in foreign ports.

ship Co., 130 NLRB 343, 359: "There is nothing inconsistent between our recognizing the foreign nationality of a foreign flag vessel, and the application of the Act in those situations where the foreign state in effect permits its vessels to be operated as an integral part of an essentially domestic enterprise engaged in a continuing and immediate manner in both the foreign and domestic commerce of this nation." [46]

B. There is no substantial basis for the assumption that defense policies served by maintenance of a Panlibhon fleet would be subverted

Before the Board, the Attorney General of the United States, on behalf of the Secretary of De-

[46] Identical treaty provisions have been held not to bar application of the Norris-LaGuardia Act (see *Afran Transport Co.* v. *Maritime Union*, 169 F. Supp. 416, 420, 425 (S.D. N.Y.)), nor the Jones Act (see *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927, 929–930 (C.A. 2), certiorari denied, 287 U.S. 642), to foreign flag ships.

Note, moreover, the Geneva Convention on the High Seas, ratified by the United States but not yet effective for lack of required ratification by 22 nations. Article 5, § 1 provides that "Ships have the nationality of the State whose flag they are entitled to fly," but adds that: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands, which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered there was no "genuine link" between the state and the ship. See IR. 79–80; Jessup, *The Law of the Sea*, 59 Col. L. Rev. 234, 255–257 (1959). The position of the United Kingdom then is in striking contrast to its position now that the flag shall be decisive of the law to be applied in these cases (see *Amicus* Briefs for the United Kingdom in No. 33, and in Nos. 91 and 93).

fense,[47] contended that, if the Act were applied to foreign flag vessels such as those here, the economic incentive for American interests to register their ships in Panama, Liberia and Honduras (the Panlibhon countries) would be destroyed, and these ships would then be transferred to other countries where they would no longer be available to the United States in time of emergency. The Board, after careful consideration, properly concluded that this contention did not warrant it in declining to apply the Act to foreign flag vessels having substantial contacts with the United States.

The argument—which appears to be directed not to the Board's legal power over foreign flag ships but to policy reasons why that power should not be exercised[48]—is applicable only to that portion of the American-controlled Panlibhon fleet which was not originally under American registry, for the portion which was could not transfer from their Panlibhon flags absent Maritime Administration approval (see n. 16, p. 19, *supra*). As to the former portion of that fleet,

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[47] The Board permitted the Attorney General to intervene in the *West India* and the three other foreign flag cases then pending (including *United Fruit*). The Attorney General presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to those cases. (IR. 9; HR. 31–32.)

[48] Indeed, in his brief to the Board the Attorney General stated (p. 20): "In submitting the policy considerations of the Department of Defense, we recognize that they should not be deemed determinative of the Board's legal jurisdiction which depends exclusively upon legal principles. The views of the Department of Defense are pertinent in suggesting that the claimed advantages of Board jurisdiction to American seamen may be illusory."

the argument rests on several assumptions which do not stand up under scrutiny."[a]

1. As the Board pointed out in *West India*, the argument assumes "that the major overriding factor motivating American shipping interests to turn to Panlibhon registration is the desire to escape the jurisdiction of the Labor Act" (130 NLRB at 366). However, in view of the many economic incentives in such registration (see p. 20, *supra*), this conclusion is unjustified. For example, there are substantial savings in taxes and vessel maintenance cost which flow from Panlibhon registry, and these would be lost if the shipowner transferred to British or Norwegian registry; it seems highly unrealistic to conclude that the mere assertion of Board jurisdiction over labor-management relations on Panlibhon ships would prompt the shipowner to forego these advantages, particularly since Board jurisdiction does not insure that a union will be certified as the representative of his employees, and, even if one were, the shipowner is not compelled to agree to any particular contract with it.

2. The Department of Defense argument rests on the further assumption that Board assertion of jurisdiction over foreign flag vessels would be limited to those of Panlibhon registry, so that the shipowner, by transferring to another registry, could elude the Act. However, the Board indicated in *West India* that its conclusion there would have been the same even if the

[a] It should also be noted that the maintenance of a "flag of convenience" fleet does not rest on any stated congressional policy. To the contrary, Congress, in the Merchant Marine Act of 1936 (46 U.S.C. 1101), expressed a national policy in favor of building up an American flag fleet, manned by citizen personnel. See *West India*, 130 NLRB at 367–368.

vessel had been under another flag. "Clearly, she would find no sanctuary in European registry if those American contacts warranting application of the Act remained otherwise substantially unchanged. Consequently, as European documentation would provide no inevitable 'escape' from the Labor Act, we fail to see how its application would necessarily encourage shipping operators to abandon Panlibhon registry with its many economic advantages" (130 NLRB at 367). And, as the Board added in *United Fruit*, 134 NLRB No. 24, p. 3 (HR. 12; HR. 34): "* * * the particular flag of nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere or across the seas, the controlling criteria are the same."

3. The portion of the Panlibhon fleet which is controlled by American interests and which can be transferred from that registry without prior Maritime Administration approval is deemed to be under effective United States control largely because the American owners have voluntarily agreed to make them available to this country in time of emergency, and there is little likelihood that those nations would need such ships for their own use in that event.[49] To assume

[49] See n. 16, p. 19, *supra;* Project Walrus Report, op. cit., pp. 57–58.

However, the soundness of the effective control principle has been questioned, on the ground, *inter alia*, that the foreign crews on the Panlibhon ships may either refuse to serve in wartime or defect and deliver some ships into enemy hands. See Project Walrus Report, p. 57; *Hearings on Ship Transfers to Foreign Flag*, Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess. (1957), pp. 3, 53, 74–77, 125–126;

that, if the American owners transferred the ships to another registry, they would no longer desire to help the United States in time of need, unduly depreciates the patriotism of these owners. Moreover, if the "new" flag country were a member of the NATO Treaty Organization, as is likely, the ships, or their equivalent, would still be available to the United States. For the NATO nations have agreed to commit the preponderance of their merchant shipping to a common pool in the event of a war affecting its members.[50]

In essence, the Department of Defense argument rests on the premise that application of the Act to maritime operations is disruptive of the free flow of commerce because it creates burdens which are competitively disadvantageous. But, as the Board pointed out (*West India*, 130 NLRB at 370):

> This argument would be as equally applicable to American as to foreign flag shipping. In fact, it would appear to apply with equal force in all those situations involving an enterprise affecting national defense and subject to foreign competition of countries with lower business taxes than, and terms of employment inferior to, those prevailing in this country. * * *

Yet, it could hardly be suggested that the Board should decline jurisdiction in all national defense industries which, *vis-a-vis* their European counterparts, are in a competitively disadvantageous economic situation. The assumption of Congress in enacting the

Hearings on Vessel Transfer, etc., House Committee on Merchant Marine and Fisheries, 85th Cong., 1st Sess., pp. 553, 601–602.

[50] See Project Walrus Report, p. 30.

Act was that application of its procedures would, by eliminating the causes of labor unrest, promote, rather than impede, the free flow of commerce. And, "it best effectuates the policies of the Act to assert jurisdiction over all enterprises * * * whose operations exert a substantial impact on the national defense. * * * [For in this area, the Board] has a special responsibility, as a Federal agency, to reduce the number of labor disputes." *Ready Mix Concrete & Materials, Inc.*, 122 NLRB 318, 320.

Finally, it is necessary to balance against the highly speculative consequences to our effective control over Panlibhon shipping of applying the Act to such shipping, the effects of not applying the Act. The latter course would not promote labor-management peace. On the contrary, it is likely that American unions would continue to picket Panlibhon vessels, and, in concert with longshore unions and the International Transport Workers Federation, to exert economic pressure against them, both at home and abroad. The peaceful procedures of the Act would not be available for resolving the representation and unfair labor practice questions underlying the labor dispute, nor, could the shipowner, under *Marine Cooks and Stewards* 362 U.S. 365, obtain an injunction in the federal courts. The result would be to leave the parties to their economic weapons, which could have a serious impact on the commerce of this nation, and encourage the shipowner or shippers to resort to state courts in an effort to find one which would enjoin the union activity.[51] It is certainly not conducive to the

[51] Or if the picketing could be shown to have secondary effects, a charge alleging a violation of Section 8(b)(4)(B) of

peaceful resolution of labor disputes and to the development of a uniform national labor policy to leave matters in this uncertain condition. Nor, in the area of international relations where a national policy is particularly desirable, does it seem appropriate to entrust the state courts, rather than the Board with its centralized administration, with the task of determining whether and to what extent American unions should be permitted to engage in organizational activities with respect to foreign flag ships having substantial points of contact with the United States.

C. The contention that application of the Act would unsettle international relations

The Department of State contended before the Board (see n. 47, *supra*), that application of the Act to Panlibhon shipping would unsettle our relationships with nations friendly to the United States.[52] This contention appears to rest on these assumptions: (1) that the Board would apply the Act only to Panlibhon ships and not to other foreign flag ships;

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the Act might be filed with the Board and an injunction obtained under Section 10(l). See *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 148 (Douglas, J. dissenting); *Teamsters Union* v. *New York, N.H. & H.R. Co.*, 350 U.S. 155. This would place the union in the unhappy position of being subjected to the Act's restraints, without being able to avail itself of the Act's benefits.

[52] The district court in No. 107 also requested the views of the Department of State with respect to the protest note of the Honduran Ambassador attached to the complaints in the subject litigation (IIR. 42–45). The Department's response was that, although it "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case" (IIR. 50).

(2) that application of the Act would collide with laws which the Panlibhon countries themselves had enacted; and (3) that these countries would be prompted to take retaliatory measures against the United States.

As we have shown (pp. 48–49), the first assumption is groundless; the Board's position is not limited to Panlibhon ships, but applicable to any foreign flag ship having substantial points of contact with the United States. The third assumption is highly speculative and affords no substantial basis for declining to give the Act the reach which it otherwise seems to have, and which would effectuate its policies.[53]

As for the second assumption, Liberia does not appear to have any laws which would cover the area encompassed by the Act (see Brief for Respondent in No. 33, pp. 52–53). Moreover, the conflict with Liberian laws, as well as with those of Panama (see *Amicus* brief for Panama in No. 33, pp. 7–8), would be more theoretical than real, for the American-controlled vessels registered in those countries generally never visit them nor carry any of their trade (see, e.g., the *West India* and *Peninsular & Occidental* cases, *supra,* and also *Incres,* No. 33, this Term). However Honduras does have laws which apparently would conflict with the Act (IR. 5; IIR. 4),[54] and the

[53] A similar contention by the State Department did not deter this Court from concluding that the term "possession" in the Fair Labor Standards Act should be interpreted to include land leased from Great Britain in Bermuda, which remained under the sovereignty of that country. *Vermilya Brown Co. v. Connell,* 335 U.S. 377, 401–402.

[54] The laws were enacted in June 1959, after the Board decision in *Peninsular & Occidental,* 120 NLRB 1097, had indi-

ships here do visit Honduras and carry some of its trade (although as an incident of United Fruit's operations). But, this is a burden which the shipowner must bear as a consequence of doing business in a manner which subjects him to the laws of two sovereignties.[55] That is, if, as we have shown, Congress intended the Act to reach labor-management relations on foreign flag vessels having substantial points of contact with the United States, the shipowner cannot be relieved of his obligation to comply with American law merely because another law may impose conflicting requirements.[56]

III. THE BOARD PROPERLY CONCLUDED THAT THE VESSELS INVOLVED IN THIS PROCEEDING HAD SUFFICIENT POINTS OF CONTACT WITH THE UNITED STATES TO BRING THEM UNDER THE ACT

As noted (pp. 11–13), the court of appeals in Nos. 91 and 93 agreed with the principle that the Act may apply to foreign flag vessels which have substantial points of contact with the United States, and these outweigh the foreign contacts. However, it disagreed

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cated that the Board was asserting jurisdiction in this area. See Legislative Service, ILO (May–June 1960), *Honduran Labour Code.*

[55] The Honduran laws did not deter the Honduran union, Sindimar, from participating in the Board proceeding and from having its name placed on the ballot in the Board election (IR. 17, 18–19; IIR. 39, 41). See also, *Hamilton Bros., supra.*

[56] Nor is any due process problem presented by the possibility that, if a new representative is certified by the Board, Empresa's outstanding contract with Sociedad (which was renewed while the Board proceeding was in progress) would be impaired (see IR. 7; IIR. 6). See *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 337; *Local 1545, United Bro. of Carpenters* v. *Vincent*, 286 F. 2d 127 (C.A. 2).

with the Board's conclusion that the United States contacts of the vessels here were predominant. We submit that the court erred in rejecting the Board's conclusion.

It is clear that the vessels here are engaged in the foreign commerce of the United States. As shown in the Statement (pp. 3–7), UFCO is primarily concerned with the raising of tropical produce, and with its transportation to market and sale. The vessels regularly ply between Central and South American locations and United States ports. On the trips to the United States, they carry produce from UFCO's Latin American plantations for sale in the United States. On their return trips to Latin America, they carry cargo for various UFCO subsidiaries, and also some general cargo for shippers and consignees outside the UFCO organization.

The vessels, however, are not owned by UFCO, but by Empresa, a Honduran corporation, which time charters the vessels to UFCO. Empresa carries out the typical responsibilities of an owner under a time charter, including hiring the officers and crews, payment of wages, and discipline of the personnel. The Board found that, nevertheless, the relationship between Empresa and UFCO was such that Empresa's maritime operations constituted part of an integrated operation under the ownership and control of UFCO, and UFCO was in effect a "joint employer" of the seamen involved. The court of appeals, on the other hand, found "the Board's statement that United Fruit is a 'joint employer' to be an erroneous legal conclusion, which must be disregarded" (IR. 62, n. 3). The Board's finding was entitled to stand, in the light of

these other facts concerning the UFCO-Empresa relationship:

1. Empresa is a wholly-owned subsidiary of UFCO; its directors are elected by UFCO; it does not carry passengers or cargo on its own account, but derives virtually all of its income from chartering its vessels to UFCO.

2. The Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO charters from one of its United States subsidiaries or owns outright a number of cargo ships registered under United States law. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargoes and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

3. Although Empresa is responsible for the crew and for certain other matters, UFCO controls the remaining phases of the vessels' operations. Thus, betterments for the vessels, and the purchase or scrapping of vessels are handled by UFCO. UFCO determines what voyages the vessels will make, their ports of call, their length of stay in various ports, and what cargoes they will carry. In exercising its control, UFCO deals directly with the particular vessel's captain. Supplies are purchased both in foreign nations and the United States, and purchases in the United States are made from Maratrop Trading Corporation, a wholly-owned UFCO subsidiary.

4. Under settled authority, these facts would clearly justify a finding that Empresa and UFCO constitute an integrated operation or a single or joint employer for purposes of the Act. See *A. M. Andrews Co.* v. *National Labor Relations Board*, 236 F. 2d 44, 45 (C.A. 9); *National Labor Relations Board* v. *Jones Sausage Co.*, 257 F. 2d 878, 880 (C.A. 4); *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 479 (C.A. 5); *National Labor Relations Board* v. *Calcasieu Paper Co., Inc.*, 203 F. 2d 12, 13 (C.A. 5); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 614–615 (C.A. 2), certiorari denied, 344 U.S. 816.[57] For "the many tiny strands of [UFCO] control * * * cannot be extricated from the total fabric of mutual obligation." *Local 24, Teamsters* v. *National Labor Relations Board*, 266 F. 2d 675, 680 (C.A. D.C.). Cf. *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 402–404.[58]

[57] See also, *National Labor Relations Board* v. *A. E. Nettleton Co.*, 241 F. 2d 130 (C.A. 2); *National Labor Relations Board* v. *Price Valley Lumber Co.*, 216 F. 2d 212, 213–214 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relation Board* v. *National Shoes, Inc.*, 208 F. 2d 688, 691 (C.A. 2).

[58] Cf. *Bowater Steamship Co.* v. *Patterson*, 303 F. 2d 369, 372–373 (C.A. 2), where, in treating a foreign subsidiary and its American parent as one for purposes of the Norris-LaGuardia Act, the court observed: "Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked, or answered, *in vacuo*' * * *; the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law. * * * As the Supreme Court has repeatedly taught, the policy behind the Norris-LaGuardia Act was a strong one; we cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes." The

Accepting the Board's finding that UFCO was a joint employer with Empresa of the seamen on the vessels here, we believe that the foreign factors relied on by the court are not entitled to the same weight which it assigned them, and therefore they do not override the otherwise substantial points of contact with the United States. Thus, the court relied, *inter alia*, on "the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner," and the fact that the vessels, though "engaged in the foreign commerce of the United States, * * * are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed for the purpose here at issue, by Honduras' interests" (IR. 77). But, if it is recognized, as the Board found, that the operations of the Honduran "subsidiary are designed essentially to further the shipping operations of the parent and not * * * an independent undertaking whose success or failure is gauged by [Empresa's] role in the open market" (IR. 15; IIR. 38), the visits to Honduras and the trade with that country take on a different character. As the Board pointed out in *Hamilton* (*supra*, p. 31), they are not the result of a truly foreign venture serving the shipping needs of that country, but rather merely "a concomitance of * * * shipping operations in the area of American international trade." In

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policy behind the National Labor Relations Act, we submit, is no less strong.

these circumstances, the Board was not unreasonable in concluding that those contacts with Honduras were insufficient "to require a finding that the operations are essentially the shipping of a foreign nation, and, thus, outside the coverage of the Labor Act" (*ibid.*). On the contrary, on the amply supported findings of the Board, Empresa's maritime operations were but an essential part of the UFCO enterprise, an American corporation, located in and directed from the United States (IR. 16; IIR. 38).

CONCLUSION

For the foregoing reasons, the Board's direction of election was valid and proper. The judgments of the courts below should thus be reversed and the complaints dismissed.

Respectfully submitted.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LEE M. MODJESKA,
Attorney,
National Labor Relations Board.

The United States intends to file a brief *amicus curiae* setting forth its position in these cases and in the related case of *Incres Steamship Co. Ltd.* v. *International Maritime Workers Union, et al.* (No. 33). While the United States disagrees with the Board's

conclusion that the National Labor Relations Act applies in the present cases, the Solicitor General has authorized the Board to file this brief urging reversal, since the agency is defending its own decision.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1962.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, U.S.C. 151, *et seq.*)

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bar-

gain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or

any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 9 * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative define in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for

appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618:

ARTICLE 10:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

* * * * *

ARTICLE 22:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

* * * * *

APPENDIX B

OWENS-ILLINOIS GLASS COMPANY, EMPLOYER

and

UNITED MARINE DIVISION, NMU, AFL–CIO, LOCAL 333, PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before M. E. Stadler, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. *Jurisdiction.* The Petitioner seeks an overall unit of employees aboard the Employer's tugs *Linden* and *Parris Island* and barges *Pulpwood No. 1* and *Pulpwood No. 2.* Though the Employer concedes that it is engaged in interstate commerce within the meaning of the Act, it contends that the Board does not have and should not assert jurisdiction over the operations of the above-named vessels as they are of foreign registry and manned exclusively by non-resident aliens and, in the case of the *Parris Island,* that tug does not operate in American waters.

The Employer is an Ohio corporation doing business in several states including Florida. During the past year the Employer purchased and received from without the State of Florida raw materials valued in excess of $50,000. During the same period the Employer shipped to points outside Florida paperboard and other finished products valued in excess of $50,000.

The vessels in questions are engaged in transporting pulpwood between the Bahamas and Jacksonville, Florida. The wood is cut in the Bahamas by Owens-Illinois Glass Company of the Bahamas, Limited, hereinafter referred to as Owens-Illinois-Bahamas, a wholly-owned subsidiary of the Employer, and is sold to the Employer. A single individual, James W. Haley, manages both the Marine Department of Owens-Illinois Glass Company, the owner-operator of the vessels, and its foreign subsidiary, Owens-Illinois-Bahamas, from a single office at 4300 Talleyrand Avenue, Jacksonville, Florida.

Owens-Illinois-Bahamas delivers the cut wood to a dock at Snake Cay in the Bahamas and loads it onto the barges *Pulpwood No. 1* and *No. 2*. The tug *Parris Island*, of Honduran registry, then tows the pulpwood-laden barges to Matanilla Shoals where it is transferred to the Liberian-registered tug *Linden* for towing to Jacksonville. At Matanilla Shoals the *Parris Island* receives an empty barge from the *Linden*. Thus, with the exception of one trip a year to Florida for purposes of dry docking, the *Parris Island* does not touch the continental United States. Moreover, the deep draft of the *Linden* prevents its making the voyage between Snake Cay and Matanilla Shoals.

The *Parris Island* carries a complement of ten unlicensed crewmen, the *Linden* thirteen, and the *Pulpwood No. 1* and *Pulpwood No. 2*, two each. All are non-resident aliens. The crew of the *Parris Island* sign Honduran articles while the crews of the remaining vessels sign Liberian articles.

The *Linden* makes approximately 7 trips per month to Jacksonville, Florida, each trip requiring it to be docked there for about 8 hours. Consequently, each barge averages 3½ trips per month with docking time identical to that of the *Linden*. All fuel for the tugs,

the cost of which per tug exceeds $10,000 annually, is obtained in the United States. All provisions for the tugs are obtained in the United States. The cost of provisioning each vessel is approximately $12,000 annually. Each of the vessels in question is dry-docked annually at Jacksonville, Florida. The cost of dry docking each tug is $18,000 per year. The combined operations of the 4 vessels result in the transportation to the United States of approximately 3 million dollars worth of pulpwood each year.

Thus, with respect to the *Linden, Pulpwood No. 1,* and *Pulpwood No. 2* we have before us vessels owned and operated from the United States by a domestic United States shipowner and which ply regularly between a foreign nation and a State of the United States. Consequently, such maritime operations possess those substantial United States contacts which bring them, despite their foreign aspects, within the jurisdictional coverage of the Act.[1]

As for the *Parris Island,* it does not, like the other vessels, have in its usual operations physical contacts with United States ports or territorial waters. This fact, it is argued, precludes, in view of the foreign registry, application of the Act to the vessel. As the facts set forth above clearly show, the trips which the *Parris Island* made are either the initial or final stages in through voyages between Snake Cay in the Bahamas and Jacksonville, Florida. The tug makes no trips to, and has no commercial contacts with, Honduras, its flag state; neither does it take the barges from port to port in the Bahamas for purposes of loading them. Rather, when it picks them up at Snake Cay they are set for their international voyage: and the *Parris Island* becomes a part of that voyage

[1] See, *West India Fruit & Steamship Company,* 130 NLRB 343; *Hamilton Bros., Inc.,* 133 NLRB No. 85.

which runs between a foreign nation and a State of the United States. Similarly, on the return of the barges to Snake Cay, the tug operates only as the concluding link in a through international voyage. To consider the mechanical act of changing tugs at Matanilla Shoals as a decisive factor in determining the nature of the commerce involved here would be to sacrifice substance to form. The essential nature of the voyage is thus fixed when the tugs leave either Snake Cay or Jacksonville and the voyages are clearly trade or transportation between a foreign nation and a State of the United States.[2] Consequently, as the *Parris Island* operates as an integral part of such trade and transportation and in view of its domestic ownership and operation, we find that the *Parris Island* and its operations possess those substantial *United States contacts which place them under the* jurisdictional coverage of the Act.

In view of the foregoing, we find that the maritime operations, subject of the petition, are in and affect commerce within the meaning of Section 2 (6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4. The *Appropriate Unit.* The Petitioner seeks a single unit, more fully described below, of crew members aboard all of the four vessels in question. The Employer, without contesting the unit composition, contends that four separate units are alone appropriate, each limited to the crew members of a single

[2] See, *Grace Lines, Inc.*, 135 NLRB No. 70.

vessel. The unit sought by the Petitioner covers insofar as the record indicates all unlicensed personnel employed in the Employer's shipping operations. Being employer-wide in scope, it is presumptively appropriate.[3] Furthermore, though the facts relied upon by the Employer are some evidence that single vessel units might be appropriate, they do not show that the requested employer-wide unit is inappropriate. Accordingly, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All crew members of the tugs *Linden* and *Parris Island* and of the barges *Pulpwood No. 1* and *Pulpwood No. 2*, excluding guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United

[3] *Miratile Manufacturing Company, Inc.*, 124 NLRB 48, 49-50; *Western Electric Company, Incorporated*, 98 NLRB 1018, 1032.

States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes, by United Marine Division, NMU, AFL–CIO, Local 333.

Dated, Washington, D.C.

[SEAL] FRANK W. MCCULLOCH,
Chairman,

BOYD LEEDOM,
Member,

GERALD A. BROWN,
Member,
National Labor Relations Board.

PHILIP RAY RODGERS, *member*, dissenting:

The Petitioner seeks an election among a unit of employees employed aboard two tugs and two barges. One of the tugs and both barges are registered under Liberian law. The remaining tug bears Honduran registry. The tow tugs carry an unlicensed crew of 23, and each of the two barges has a two-man crew. None of these persons is either a resident or citizen of the United States. The articles which these crewmembers sign are either Liberian or Honduran and each contract of employment recites that the governing law and regulations is to be that of either Liberia or Honduras, as the case may be.

Contrary to my colleagues, and for the reasons stated by the United States District Court for the District of Columbia in *Sociedad de Marineros,*

(*United Fruit Company*), — F. 2d — (D.C. Cir. 1962), 49 LRRM 2434, 2441, the United States Court of Appeals for the Second Circuit in *Empresa Hondurena de Vapores* (*United Fruit Company*), — F. 2d — (2d Cir. 1962), 49 LRRM 2442, and my dissenting opinions in *West India*, 130 NLRB No. 46 and *Hamilton Bros. Inc.*, 133 NLRB No. 85, I would dismiss the instant petition.

Dated, Washington, D.C.

PHILIP RAY RODGERS,
Member,
National Labor Relations Board.

DALZELL TOWING COMPANY, INC., AND COMPANIA DE NAVEGACION SUFFOLK, S.A., EMPLOYER

AND

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Carl B. Davidson, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Petitioner seeks a unit of all unlicensed seamen aboard the tanker, *Estrellita*, a Panamanian flag vessel. The companies contend that in view of the vessel's flag and the other foreign factors here present, the vessel and its operations do not come within the jurisdiction of the Act.

Compania De Navegacion Suffolk, S. A. (here called Suffolk), a Panamanian corporation, is the owner and operator of the *Estrellita*,[1] a Panamanian

[1] Dalzell Towing Company, Inc., named in the petition as the Employer together with Suffolk is the agent for the *Estrellita* while in the port of New York. Dalzell receives invoices for fuel, provisions, and other items for the vessel which it pays with sums advanced by Suffolk. In addition, it serves as the local cable and letter address for the *Estrellita*. However, as Dalzell is not otherwise responsible for the operation of the vessel, does not hire its crew, pay their wages, or otherwise affect their employment, we find it is not the employer of the employees sought herein.

flag vessel, and the only vessel involved in this proceeding. Suffolk's sole business is that relating to the *Estrellita* which it charters on the world market. In fact, Suffolk was apparently organized as a wholly owned subsidiary by Oil Transfer Corporation for the express purpose of owning and operating the *Estrellita* under the Panamanian flag in world trade. As for Oil Transfer, which formerly owned the Estrellita, it is a Delaware corporation engaged in the operation of American flag vessels carrying bulk liquids in U. S. coastal trade. All stockholders of Oil Transfer are American citizens, and all officers of that corporation hold corresponding positions with Suffolk. Additionally, three of Suffolk's five directors are directors of Oil Transfer. All the officers and directors of both corporations are U. S. citizens.

Though Suffolk's "principal place of business is in Panama, its office there appears to be little more than the minimum required to take advantage of incorporation under the laws of that country. Its business is actually carried out from its New York offices shared with Oil Transfer, where general executive policy and decisions relating to the *Estrellita* are made by the company's officers. As noted, Suffolk charters the *Estrellita*, apparently under time charter arrangements. Suffolk is responsible at all times for hiring the officers and crew of the vessel, for provisioning and repairing it, and for carrying out other operational details. When owned directly by Oil Transfer the *Estrellita* was engaged as an American flag vessel in U.S. Coastal traffic carrying oil. However, this vessel in 1957 was transferred to Suffolk and was apparently placed under the Panamanian flag at this time. Since then, the *Estrellita's* operations have been wholly separate from the coastal trade of Oil Transfer. Thus, she has been offered for

charter on the world market for the conveyance of oil, water, molasses and chemicals and has been chartered by both domestic and foreign corporations. As a result of this type of operation the *Estrellita* has spent, since her transfer to Suffolk, only some 26 percent of her total operation time in voyages on which she entered U.S. ports. During the first two years of such operations, the *Estrellita* remained almost exclusively in service in Sumatra working under charter to a Dutch Oil Company. More recently, during the year immediately preceding the filing of the petition she was chartered primarily to American shippers and, in consequence, a large majority of her voyages touched United States ports.

It is evident from the foregoing, and we find, that Suffolk, as the owner-operator of the *Estrellita* with full responsibility for manning the vessel and otherwise dealing with the crew, is the Employer of the employees in the requested unit. We find further that Suffolk is basically an instrumentality of Oil Transfer.[2] This is apparent from the facts (1) that its officers and three of its directors hold the same positions with its parent, (2) that it shares common offices with its parent, and (3) that it was organized for the particular purpose of operating one of its parent's ships in international trade. And, because of the above, and the fact that Suffolk operates its business for the most part from the United States we find also that Suffolk is, despite its Panamanian incorporation,[3] essentially a domestic U.S. enterprise. In sum, we have here an American employer engaged in operating a vessel, in commercial activities involv-

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[2] See *Peninsular & Occidental Steamship Co.*, 120 NLRB 1097.

[3] See *Chemical Carrier* v. *R. Smith & Co., International*, 154 F. Supp. 886.

ing voyages touching U.S. ports some 26 percent of the time over a three-year period, or about 50 percent during the year preceding the filing of the petition.

In determining in other cases whether substantial contacts exist which bring a foreign flag vessel within the jurisdictional coverage of the Act,[4] the Board has noted the importance of the U.S. nationality of a ship-owning employer and of voyages to and from U.S. ports. However, the Board has also emphasized that the application of the substantial contact test for determining maritime jurisdiction is not simply a mechanical operation of finding the presence of some special contacts. "Rather the problem is one," the Board has stated, "of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation * * *".[5] Consequently, we have looked to the national connections of the owner-operator of a ship as important insofar as these connections show the nationality of the commercial activities in which ship is involved.[6] The situation here is different, however, in that it is the business operations of the charterers, who may or may not be U.S. nationals, and not that of Suffolk, which determines in what commerce the *Estrellita* will sail. Indeed, under the type of charter operations here involved, the U.S. connections of the owner-operator, though showing some U.S. interest in the ship, do not

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[4] See *West India Fruit & Steamship Co.*, 130 NLRB 343; *Hamilton Bros.*, 133 NLRB No. 85, p. 3; and case cited fn. 2 above.

[5] *United Fruit Company*, 134 NLRB No. 25, p. 3.

[6] In *Eastern Shipping Corporation*, 132 NLRB No. 72, the Board found the Act to apply even though the owner-operator of the ship was a *bona fide* foreign corporation as the facts showed the ship was operated as a part of an essentially domestic U.S. enterprise.

in themselves demonstrate sufficiently substantial U.S. contacts to confer jurisdiction. Similarly, the physical contacts of the vessel to the United States do not evince substantial ties to the commerce of this nation. Thus, the physical contacts derive not from the connection which the ship and its operation have to the owner-operator's fixed U.S. enterprise,[7] but rather from the charter's business; and the charterer, to reiterate, is whoever happens to charter the vessel.[8] In addition, nothing in the record before us suggests that either Suffolk or economic conditions favor chartering of the vessel by domestic, U.S. enterprises.[9] While the chartering of the vessel, during the year prior to the filing of the petition, did lead the vessel into frequent contacts with U.S. ports, there is no indication that the pattern of the recent past will continue into the future. In our view, this fortuitous element underlying the physical contacts of the vessel with the United States diminishes the importance of such contacts in determining whether jurisdiction exists."

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[7] As the Board has pointed out, in its view the mere fact a ship visits U.S. ports sporadically or regularly does not alone determine whether or not the Act is applicable. The test is whether or not the shipping is that of this nation, rather than that of a foreign nation. See *United Fruit Company*, 135 NLRB No. 25; also, *Eastern Shipping Corp.*, 132 NLRB No. 72, p. 5, and *Hamilton Bros.*, 133 NLRB No. 85, p. 3.

[8] Thus, it should be noted that the situation here is sharply distinguished from those in *United Fruit*, *supra*, and *Peninsular & Occidental*, *supra*, where the foreign corporations chartered their vessels only to U.S. corporations to which they were related for the continuing use of such corporations as an adjunct of their U.S. located commerce. Consequently, the ships by the very nature of the business in which they were involved regularly traded with U.S. ports, and barring some wholly unforseen change would continue to do so.

[9] As the Board pointed out in *West India*, *supra*, the Supreme Court seems to have held that "something more than a chance

In view of the foregoing, we conclude that substantial American contacts under the Board's decision in *West India* are not present in this proceeding. As there are no overriding U.S. interests warranting a finding that the *Estrellita* comes within the jurisdiction of the Act, we defer to the law of the flag, which is itself a substantial contact,[10] and find that we are without jurisdiction to proceed. We shall, therefore, dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

Dated, Washington, D.C., May 29, 1962.

[SEAL] FRANK W. McCULLOCH,
Chairman,

BOYD LEEDOM,
Member,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,

National Labor Relations Board.

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of fortuitous connection to substantial American interests is required before it will find a Congressional intent to regulate the event." 130 NLRB No. 46, p. 25, fn. 74.

[10] See *Lauritzen* v. *Larsen*, 345 U.S. 571, 584.

PHILIP RAY RODGERS, *member*, concurring:

This is yet another one of those cases in which the Board has been asked to assert jurisdiction over vessels owned by American shipowners, but registered under the flags of foreign nations and operated almost entirely by foreign citizens.[11]

While I am not persuaded that the so-called jurisdictional factors here are essentially different from those in a number of cases where the Board has justified an assertion of jurisdiction, I concur in dismissing the instant petition—but for the reasons I asserted in my dissenting opinion in the other cases.[12]

Dated, Washington, D.C., May 29, 1962.

PHILIP RAY RODGERS,

Member,

National Labor Relations Board.

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[11] *West India Fruit and Steamship Company, Inc.*, 130 NLRB No. 46; *Peninsular & Occidental Steamship Company*, 132 NLRB No. 1; *Hamilton Bros., Inc.*, 133 NLRB No. 85; *Eastern Shipping Corp.*, 132 NLRB No. 72; *United Fruit Company*, 134 NLRB No. 25; *Owens-Illinois Glass Company*, 136 NLRB No. 32. See also *Grace Line, Inc.*, 135 NLRB No. 70.

[12] See *Sociedad de Marineros (United Fruit Company)* decided January 18, 1962, 49 LRRM 2434 (U.S. Dist. Ct. for the Dist. of Col.); *Empresa Hondurena de Vapores (United Fruit Company)*, 49 LRRM 2442, F. 2d (C.A. 2, 1962). *Owens-Illinois Glass Co.* v. *McCulloch, et al.* (United States District Court for the District of Columbia) April 13, 1962, enjoining representation election order in Board Case No. 12-RC-1293.

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